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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 60

DICK GREGORY, et al.,

Defendants-Appellants,

v.

CITY OF CHICAGO, a Municipal Corporation,

Plaintiff-Appellee.

BRIEF OF APPELLANTS

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In The

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October Term, 1968

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v.

CITY OF CHICAGO, a Municipal Corporation,

Plaintiff-Appellee.

BRIEF OF APPELLANTS

OPINION BELOW.

Appellants ask this Court to reverse the judgment of the Illinois Supreme Court reported at 39 Ill. 2d 47, 233 N.E. 2d 422 (1968), and set out in full as an appendix to the petition for a writ of certiorari in this case.

JURISDICTION.

Defendants ask for reversal where they were convicted of disorderly conduct under the Municipal Code of Chicago, Section 193-1, affirmed by the Illinois Supreme Court on January 19, 1968. This Court granted defendant's petition for a writ of certiorari. Jurisdiction is invoked under U.S.C. Section 1257.

MUNICIPAL ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Municipal Code of Chicago, Section 193-1

All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city; all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons; . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense.

United States Constitution, Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

QUESTIONS PRESENTED FOR REVIEW.

Whether peaceful demonstrators:

1. Are guilty of disorderly conduct as a result of invective and threat of violence of their hecklers?

2. May be convicted under a disorderly conduct ordinance that leaves discretion in the police of which First Amendment conduct is proscribed?

3. Are denied a fair trial where in a jury trial on disorderly conduct the prosecution gets an instruction on a parade permit where no permit was required?

STATEMENT OF THE CASE.

On August 2, 1965, defendants and others protesting public school conditions in Chicago, met at Buckingham Fountain, marched to City Hall and conducted a brief demonstration, and continuing under police scrutiny, continued to the home of the Mayor on the 3500 block on South Lowe Street (R. 105-106). The marchers went four times around the block (R. 623). They were peaceful and well disciplined (R. 146, 161, 184, 558, 616-617). They carried placards protesting conditions in the schools and calling for the removal of the general superintendent of schools (R. 106, 538, 539, 644-645). They did not shout or throw things, and pursuant to a police suggestion, they ceased all singing after 8:20 p.m. (R. 137, 153-154, 161-162, 184, 548, 558, 613-615). Except when prevented from doing so by hostile onlookers, or by sprinkler hoses that had been set and turned on in their path, (R. 150, 618, 623), the marchers kept to the public sidewalks along their way in double file (R. 148, 159, 618). They varied their route on the fourth trip around the block to avoid 100 to 150 spectators who had begun their own march (R. 632, 633-634). They waited for signals either from the police or from an assistant corporation counsel before proceeding (R. 632, 635, 636). Police Commander Pierson, in charge of the police officers present, stopped the marchers on 35th Street, near Lowe (R. 162-163), at a time when the crowd of spectators had grown to about 1,000 to 1,200 persons (R. 162-163), and after a number of spectators had shouted, yelled, made threats, obscene gestures and remarks, and used invective and demeaning

terms at the marchers (R. 108, 116, 130, 133, 137, 160, 184-185, 549, 554, 621), and after a number of spectators had hurled rocks, eggs, or bottles at the marchers (R. 112, 114-115, 120-121, 154, 160, 184-185, 554). It is disputed whether Commander Pierson told the marchers, through defendant Gregory who acted as their spokesman, that they would be permitted two more trips around the block and then be requested to leave (R. 638, 639-640, 660), or whether the Commander directly requested the marchers to leave, because he thought the situation was becoming increasingly dangerous (R. 114, 118, 551). The Commander testified that when none of the marchers elected to leave, he used a loud-speaker and asked them to leave because "their presence here might incite a riot, because the crowd was unruly." (R. 552, 568). He told them that if they persisted in marching they would be arrested (R. 553, 569). He offered police escorts through the hostile crowd to those marchers who were willing to leave, and three or four did accept (R. 119, 189, 310, 553). The Commander repeated his request to the rest of the marchers about five times and then ordered their arrest (R. 119-120, 209, 567). Pursuant to instructions from defendant Gregory, each marcher was peaceful and cooperative, and walked into police vans when arrested (R. 553, 643-644).

Defendants were charged with violation of separate provisions of Section 193-1 of the Municipal Code of Chicago, that they (R. 2) "Did make or aid in making an improper noise, riot, disturbance, breach of peace, or diversion tending to a breach of the peace, within the limits of the city," and that they (R. 803) "Did collect in a crowd or body for unlawful purposes or for purposes to the annoyance or disturbance of other persons."

Defendants' pre-trial motions to dismiss the complaints (R. 69) were denied and defendant Gregory and four others were tried by jury. On a stipulation of facts, the charges against the other 35 defendants were later determined on the same record.

At the trial the court over objection permitted the city to introduce testimony of statements attributed to defendant Gregory at Buckingham Fountain. The statements, made some four hours prior to the incident at issue, occurred in the presence of the police who made no arrests at that time and who permitted the defendants to march through the downtown area and then south to 35th Street (R. 104-106) in their presence. Also over objection the city was permitted to show that none of the defendants had parade permits (R. 97, 100). In closing argument the City prosecutor repeatedly stated that the demonstrators were without a parade permit, and implied that a permit was required (R. 759, 764, 781, 784). And over objection the court gave an instruction to the jury in the language of the "parade permit" ordinance (Section 36-31 of the Municipal Code of Chicago), although no violation of that ordinance was charged against the defendants (R. 751, 796-797). Defendants were repeatedly not permitted to cross examine as to whether arrests of the spectators were made (R. 139, 144, 510). In those instances where such cross examination was allowed, the city's witnesses testified that no spectators were arrested (R. 530). Neither were defendants permitted to show a "lawful" purpose for their conduct (R. 645-646). The court over objection read the two provisions of Section 193-1 to the jury as an instruction (R. 719, 795), although defendants' instruction in the

terms of constitutional provisions on free speech, assembly, and petition was refused (R. 668).

Defendants' motion for a directed verdict of acquittal was denied and written post trial motions were denied (R. 597, 25), and judgment was entered on the verdict and defendant Gregory and four others were fined $200.00, on each charge, and on a stipulation of facts, the other 35 defendants were fined $25.00 on each charge.

On review, the Illinois Supreme Court held (Appendix, p. 15a) that defendants were not denied their right to free speech, free assembly, and freedom to petition for redress of grievances. The Court held (Appendix, p. 13a) that all reasonable efforts were made to protect the demonstrators, even though the record shows (R. 475, 476, 478, 530) that none of the threatening spectators was arrested and no attempt was made to disperse the crowd. The Court ruled (Appendix, p. 16a) that the Chicago disorderly conduct ordinance was not unconstitutionally vague or overbroad even as applied to free expression and free assembly. Finally, the Court decided (Appendix, p. 16a) that it was not prejudicial error to instruct the jury on the Chicago parade permit ordinance, even though defendants were not charged under that ordinance and no permit would have been required. Petitioners seek review of this decision.

SUMMARY OF ARGUMENT.

The Chicago disorderly conduct ordinance was applied so as to thwart defendants' peaceful conduct that was protected under the First Amendment, and defendants were convicted for the threats and violence of spectators who chose to heckle them on the public way (Point I). The ordinance itself is vague when applied to First Amendment activity, proscribes protected conduct, is without standards, and leaves discretion to the police as to when protected conduct becomes unlawful (Point II). And the defendants were prejudiced in this free speech case when the trial court instructed the jury in the language of a parade permit ordinance when no permit was required for the peaceful First Amendment activity of the defendants (Point III).

ARGUMENT.

I.

WHERE DEMONSTRATORS ARE PEACEFUL, A CONVICTION OF DISORDERLY CONDUCT MUST BE REVERSED WHEN IT IS BASED ONLY ON THE REACTION OF THE SPECTATORS TO THE UNPOPULAR VIEWS OF THE DEMONSTRATORS.

The Heckler's Veto Conflicts With The First Amendment.

In this case the defendants were peacefully demonstrating in the public way on an issue of general public concern. Spectators who chose to appear began to heckle them, and while the conduct of the demonstrators remained orderly, and at police suggestion even turned silent, the spectators became threatening and violent. The police gave the demonstrators the election of ceasing their activity, or of being arrested, and when the demonstrators refused to stop, arrested them. Thus, the demonstration was terminated on the "heckler's veto", an apt term coined by Professor Harry Kalven, *The Negro and The First Amendment* (1965), pp. 140-160. The demonstrators were convicted of two counts of disorderly conduct and the conviction was affirmed. If the opinion stands, freedom of speech will be determined by the violence of those opposed to peaceful expression.

The demonstrators were charged and convicted of two separate charges of disorderly conduct under the Chicago Ordinance, Municipal Code, Section 193-1. As set out below in Point II, the ordinance is vague, restrains and proscribes protected First Amendment conduct, and with-

out standards allows discretion in the police to decide when such conduct becomes improper. But it is also vague as to just what conduct is prohibited. The provisions of the ordinance charged read:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city;"

and:

> "all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons . . . shall be deemed guilty of disorderly conduct."

The ordinance was apparently applied so as to charge the demonstrators, engaged in free speech, under the first provision with the responsibility of the threats and violence of the crowd, and under the second provision with causing the crowd to gather to the annoyance of some unnamed persons. (Complaint, R. 2, 803). On the record in this case these charges are in conflict with the First and Fourteenth Amendments of the Constitution, and with prior decisions of this Court.

A Demonstration In The Public Way.

First, the demonstrators were in the public way.

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind have been used for the purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places has from ancient times been a part of the privileges, immunities, rights and liberties of citizens." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939), Roberts, J.

This distinguishes *Adderley* v. *Florida,* 385 U.S. 39 (1966). It is not relevant that the demonstration ended up in a residential area as there was no "precise and narrowly drawn" ordinance prohibiting such activity in such areas, see Kamin, *Residential Picketing and the First Amendment,* 61 N.U.L. Rev. 177 (1966), and this Court has upheld demonstrations on private, company owned town property, *Marsh* v. *Alabama,* 326 U.S. 501 (1946), on private residential property under certain circumstances, *Martin* v. *Struthers,* 319 U.S. 141 (1943), and most recently, in the open area of a shopping center, *Amalgamated Food Employees* v. *Logan Valley Plaza, Inc.,* 88 S. Ct. 1601 (1968). In the Count below the City argued that the demonstrators "invaded" the neighborhood, and that the spectators were "a captive audience". If they invaded the community, they did so with police approval, in the company of the City prosecutor, and the spectators elected to stay and were not captives.

Peaceful Demonstrations On Public Issues—Annoyance.

Next, the conduct here involved a public issue and the demonstrators were peaceful.

> "We are here dealing with the aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for redress of grievances. . . As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceful and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." *Brown* v. *Louisiana,*

> 383 U.S. 131 at 141-142 (1966) (Fortas, J., prevailing opinion)

See also *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). And as such, their conduct was a form of protest, not disturbance, and protected, whether or not it was annoying. And it is clear that if the defendants annoyed anyone it was the spectators and then only because of their unpopular views. And this Court has followed *Edwards* in cases on even more difficult facts, *Henry* v. *City of Rock Hill,* 376 U.S. 776 (1964), and *Fields* v. *South Carolina,* 375 U.S. 44 (1963). In *Fields* mere presence of about 1,000 demonstrators favoring unpopular views on the race issue was held insufficient to support breach of the peace convictions, even though the result of the demonstration was to disrupt traffic. *State* v. *Brown,* 126 S.E. 2d 1, 3 (1962), and in *Henry* convictions for the same charges also based on protest of racial conditions were reversed even though the singing of the defendants caused disruption of work in the town's city hall, 241 S. Car. 427, 128 S.E. 2d 775 (1962). The Court reversed holding that as in *Edwards* and *Fields* (pp. 777-778):

> "they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection."

And in *Edwards,* (p. 237), the Court had concluded that "the Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views." First Amendment freedoms include peaceful demonstration on public property, a form of expression, as "free political discussion," and see *Cox* v. *Louisiana,* 379 U.S. 536 (1965). Note also

> "The style of the protest, as I said, seems to me essentially the same in both cases [*Cox* and *Edwards*], and the style is worth noting. These are structured ceremonials of protest; they are not riots. The demonstrators were not, as the majority recited the record, trying to bring government to a halt; rather they were expressing the concern of the young Negro about his situation. What was symbolized was a deep grievance, a break with society. They prayed, they pledged allegiance to the flag, they sang "God Bless America," and—in *Cox*—they even stopped for a red traffic light. Whatever the power, pressure, and anxiety generated by such huge numbers, the demonstrations showed a tact, a grace, a patience, and a distinctive rhetoric of their own." Kalven, *The Concept of the Public Forum*, 1965 *The Supreme Court Review*, 1, 6.

Such demonstration, by definition, necessarily causes dispute. This is

> ". . . a function of free speech under our system of government . . . to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. This is why freedom of speech, though not absolute, (citation omitted), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public convenience, annoyance or unrest (citations omitted). There is no room under our Constitution for a more restrictive view. For the alternative could

> lead to a standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello* v. *Chicago*, 337 U.S. 1, (1949) at 4-5.

The case is just the same as *Cox* v. *Louisiana,* 379 U.S. 536, *supra.* The protestors there were allowed to stay until the spectators became annoyed, then the protestors were ordered to cease their activity. The Court on its own independent examination of the record, concluded (at 545) that, in spite of the spectators' reaction, the record showed "no conduct which the state had a right to prohibit as a breach of the peace" holding that Louisiana had infringed upon the defendant's rights to free speech and free assembly. See also *Garner* v. *Louisiana,* 368 U.S. 157 (1961), Harlan, J. concurring; Kalven, *The Negro and the First Amendment,* pp. 129-132 (1965). Thus, the charge under the ordinance of annoying the spectators must fall.

Violence Of The Spectators, Unprovoked.

And it follows that this court has refused to uphold "the heckler's veto" in the First Amendment area. The Court has protected free speech and free assembly against inroads by crowd hostility, whether from the crowd itself or from the state and local officials who infringed upon the demonstrator's rights in the guise of protecting them from the crowd's hostility.

> "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." *Brown* v. *Louisiana,* 383 U.S. 131, 133, n. 1 (1966) (Fortas, J., prevailing opinion)

And *Watson* v. *City of Memphis,* 373 U.S. 526, 535 (1963), quoted in *Cox* v. *Louisiana,* 379 U.S. 536, *supra,* 551, that "the compelling answer to this contention is that constitutional rights may not be denied simply because of the hostility to their assertion or exercise." See Kalven, *The Negro and The First Amendment* (1965), pp. 140-160. And in *Wright* v. *Georgia,* 373 U.S 284 (1963) the Court held (at 293) that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present." Thus, the Illinois Supreme Court has misapprehended these cases (Opin., App. pp. 8a-12a).

And the defendants here are not guilty for refusing to leave because the police request was made only because of the illegal conduct of the spectators, as a means of cutting off the peaceful and protected conduct of the defendants, *Wright* v. *Georgia,* at p. 292, holding that there is no obligation to obey the order of a policeman which is itself unconstitutional, and see *City of Chicago* v. *Williams,* 45 Ill. App. 2d 327, 330-331, 195 N.E. 2d 425, 427 (1963), "there is no obligation to obey . . . a police order if it is arbitrary and unreasonable."

If either of the charges against the defendant stands, the heckler's veto would be proper in such instances as when spectators shouted down Secretary of State Dean Rusk, Secretary of Agriculture Orville Freeman, or Chancellor Kirk of Columbia University and will establish the rule that the police are the enforcers of the will of

the majority in the face of unpopular views. Note this danger:(**)

(**) February 2, 1968

CHICAGO SUN-TIMES
EDITORIAL PAGE

A PICTURE OF VIOLENCE

An investigation into the shameful activities that have been taking place outside the Mount Greenwood Elementary School, 10841 S. Homan, has been ordered by Deputy Police Supt. James Rochford. He took the action after viewing photographs taken by Duane Hall, Sun-Times photographer, which showed that police arrested two men who had been kicked and beaten by backlash picketers at the school. The police did not arrest the attackers.

We trust Rochford's investigation will cover not only the circumstances of this particular arrest but the general attitude of the policemen assigned to the school.

Since Monday, picketers organized by Operation Crescent, a suburban-based group opposed to school integration, have marched at the all-white Chicago school protesting the transfer to it of seven Negro pupils. The transfer is part of the school board's program to relieve overcrowded classes.

The Crescent marchers certainly have a right to picket just as pro-integration groups have, although it should be well noted that community organizations in the area have taken a stand *against* the Crescent demonstration. Its extremism is not supported by all parents of children in the Greenwood school.

We do not believe that the right to picket includes the disturbance of the peace by vocally harassing the Negro children as they arrive and leave the school. The police have not attempted to curb this disgraceful yelling at little children, which is reminiscent of scenes in Little Rock in 1957. Even Little Rock now accepts integration.

See Haiman, *The Rhetoric of the Streets, Some Legal and Ethical Considerations,* Quarterly Journal of Speech, Vol. LIII, No. 2, 1967(•), p. 112:

> "Thus a march which begins as a peaceful parade of 1,000 through the streets of Chicago soon turns into a potential race riot requiring the intervention of hundreds of policemen. But let us be clear, as so few people seem to be, about what has changed this peaceful parade into such a potentially dangerous activity that the mere threat to march is perceived as a coercive weapon. The change has been wrought *by the hostile audience* which, rather than contenting itself to stay at home and ignore the demonstrators, chooses to go out on the streets to confront them. There is nothing *inherently* coercive about one dis-

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(••—continued)

On Wednesday, two men, both 25, appeared at the school to counter-picket for school integration. The Crescent picketers slugged them and tore their picket signs. Photographer Hall recorded kicks and punches against the men, who did not fight back. One showed a policeman moving in to break up the action. Several times police moved in to separate the men from their assailants. Finally to end the fracas the police arrested the victims of the assaults. Why did they not at least also arrest the sluggers and restore order after the very first punch was thrown?

The transfer plan being protested by these un-American activities is official Board of Education policy. The Chicago Police Department has a responsibility not only to preserve order at schools without taking sides in a controversy but also to help school authorities carry out official city policy when they need police help. We hope Rochford's report will be a reminder of these responsibilities.

(•) Copies of this article, not commonly available in law libraries, will be submitted with this brief for the use of the Court.

> senter, or one hundred, or one thousand, walking peaceably down a street or gathering to sing in front of a building. Their activity is endowed with coercive potential only if others go forth to do battle with them, or feel too guilty and fearful to leave them alone." (Italics by the author)

The demonstrators never provoked the spectators (i.e., called them names, challenged them to fight, threw rocks, eggs or bottles) but the spectators did so, and the Illinois Supreme Court so found (Opin. App. 4a-7a) Distinguish *Feiner* v. *New York,* 340 U.S. 315 (1951), *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952). But the Court below upheld the conviction merely because of the continued presence of the demonstrators (Opin., App. 15a), who were making their point in the face of the hostile crowd.

In *Amalgamated Food Employees* v. *Logan Valley Plaza,* 88 S. Ct. 1601, *supra,* this Court upheld protection of peaceful picketing. Would the decision change if the employees of the super-market, customers, or others using the center, had beseiged the peaceful pickets, hailed them with invective, epithets, eggs and rocks? Would this illegal conduct make the peaceful actions of the demonstrators illegal? It is absurd to say yes, but that is the basis of the decision below.

We have learned that we can sustain demonstrations in hostile or crowded places *Williams* v. *Wallace,* 240 F. Supp. 100 (1965), enjoining the Governor of the State of Alabama and other state and local officials from interferring with a proposed march by demonstrators from

Selma to Montgomery, Alabama, and from failing to provide adequate police protection to the demonstrators during the march.

> "The defendants' contention that there is some hostility to this march will not justify its denial [citations omitted]. Nor will the threat of violence constitute an excuse for its denial." (at p. 109)

And, see *Wolin* v. *Port Authority of New York,* 392 F. 2d 83, (2nd Cir., 1968), upholding the right to an orderly protest demonstration even in a crowded bus terminal, at p. 93.

> "We should in these times be mindful that to the extent we secure legitimate and orderly access to means of communication for all views, we create conditions in which there is no incentive to resort to more disruptive conduct."

And this is what occurred here. The defendants followed police instruction in their route. Distinguish *People* v. *Levner,* 30 N.Y.S. 2d 487, 492 (1941), and *United States* v. *Woodard,* 376 F. 2d 136 (7th Cir., 1967)(*), *People* v. *Turner,* 265 N.Y.S. 2d 841 (1965), (*sub nom. Turner* v. *New York,* 386 U.S. 773, (1967), writ of certiorari dismissed as improvidently granted).

Finally, the fact that the police did enforce the heckler's veto is also clearly established as the record shows no arrest of a single demonstrator, even though the police observed individuals shout curses, and even though the

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(*) See Cummings, J., p. 146, concurring, who would have reversed a conviction under the ordinance on the facts of the present case, and would have held the ordinance unconstitutional as applied.

police physically threw individual spectators back into the crowd.(**) (R. 7a)

The decision of the Court below upholding the heckler's veto has been codified by the City of Chicago into its new disorderly conduct ordinance,

> "A person commits disorderly conduct when he knowingly: * * *
>
> Refuses or fails to cease and desist any peaceful conduct or activity likely to produce a breach of peace where there is an imminent threat of violence, and where the police have made all reasonable efforts to protect the otherwise peaceful conduct and activity, and have requested that said conduct and activity be stopped and explained the request if there be time;
>
> Section 193-1 of the Municipal Code of the City of Chicago, as amended, Journal of the Proceedings of the City Council of the City of Chicago, Illinois, Tuesday, March 26, 1968, pp. 2561-62."

If the opinion is allowed to stand the heckler's veto will prevail.

II.

THE CHICAGO DISORDERLY CONDUCT ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE AND SHOULD BE STRUCK DOWN.

The Decision Below Conflicts With Decisions Of This Court And Of Other Courts.

This Court has already reversed a conviction under the Chicago ordinance on vagueness grounds, *Terminiello* v. *Chicago,* 337 U.S. 1 at 6 (1949), but the Illinois courts

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(**) It is public knowledge that subsequent to the arrests in this case the Chicago Police Department sometimes changed its tactics, and were effective in crowd control by arresting the hecklers.

have continued to convict under the ordinance. This court has invalidated similar ordinances because of vagueness and overbreadth. *Cox* v. *Louisiana,* 379 U.S. 536 at 552 (1965); *Edwards* v. *South Carolina,* 372 U.S. 229 at 238 (1963); *Wright* v. *Georgia,* 373 U.S. 284 at 293 (1963); see *Brown* v. *Louisiana,* 383 U.S. 131 at 144 (1966), Brennan, J., concurring. The Federal District Court for the Northern District of Illinois, Eastern Division, recently found the Chicago ordinance void for vagueness and overbreadth. (The City is appealing that decision). *Landry* v. *Daley,* 280 F. Supp. 968 (N.D. Ill. E.D., 1968).

> "This ordinance [Section 193-1] has to be one of the most charming grab-bags of criminal prohibitions ever assembled. Some of its provisions are nostalgic though obviously obsolete. Jugglers or touts, ropers, steerers or cappers for gambling houses are today as rare as buggy whips. Obsolescence, however, does not connote unconstitutionality.
>
> "Others of the provisions are clearly of current concern. Prohibition against engaging in any fraudulent scheme, device or trick to obtain money or other valuable thing or the obtaining of money or other valuable things by trick or fraud is certainly a proper exercise of the city's police power though it is not generally considered "disorderly conduct." Similarly, the city has a legitimate concern and duty to preserve the peace from forceful or violent breaches thereof whether by individuals or mobs.
>
> "It is equally obvious that other portions of the ordinance are both vague, indefinite and overbroad and therefore unconstitutional. Unfortunately, they are so inextricably intertwined with the valid segments that it is impossible to sever them and thereby preserve the latter.

"For example, the opening language, "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace" contains prohibitions which are clearly vague and indefinite, as well as overbroad. What is an "improper noise?" The dictionary defines "improper" in part as "not in accordance with fact, truth or right procedure," and "not in accordance with propriety, modesty, good taste or good manners."(1) The definition of "noise" includes "loud, confused or senseless shouting," "sound or a sound that lacks agreeable musical quality or is noticeably loud, harsh or discordant," "any sound that is undesired or that interferes with something to which one is listening," or even alternatively "sound or a sound that is not regarded as unpleasing or that has a pleasing melodious quality" as, for example, "the noise of heavenly choirs."(1)

"The number of sounds which are constitutionally permitted and protected and which would fall within the proscription of "improper noise" is infinite. Political campaigns, athletic events, public meetings and a host of other activities produce loud, confused or senseless shouting not in accord with fact, truth or right procedure to say nothing of not in accord with propriety, modesty, good taste or good manners. The happy cacophony of democracy would be stilled if all "improper noises" in the normal meaning of the term were suppressed.

"The Supreme Court has held on several occasions that statutes or ordinances prohibiting "noise" are valid only to the extent that they are necessary to

(1) Webster, New International Dictionary (3d ed. 1961, Unabridged) p. 1137.

(1) Webster, New International Dictionary (3d ed. 1961, Unabridged) p. 1533.

the protection of other important public interests, e.g., the prohibition of horn blowing or other noise in a hospital zone. Prohibition of "noise" per se is unconstitutional.[2] And the addition of the vague and indefinite adjective "improper" does not cure the defect.

"Not only is making, aiding or assisting in the making of an improper noise a crime, but it is likewise a crime to "countenance" the making of such a noise by a third party. The literal language would apparently create a duty on all persons in the vicinity of one making an improper noise at least to attempt to effect a termination thereof. If the citizenry took this duty seriously, it staggers the imagination to contemplate the result. There would be more action in the stands than on the field at any athletic event as spectators sought to protect themselves from violating the law against countenancing the improper noises being made by others about them.

"Also proscribed is making, aiding, countenancing or assisting in the making of a "disturbance" which Webster defines in part as "an interruption of a state of peace or quiet," or "an interference with a planned, ordered or regular procedure, state or habit."[1] Again, this is both too vague and indefinite as well as overbroad. The legitimate exercise of free-

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[2] *See Edwards* v. *South Carolina,* 372 U.S. 229, 233 (1963). *See, also, Cox* v. *Louisiana,* 379 U.S. 536, 546-50 (1965). In *Cox,* the Louisiana Supreme Court defined the term "breach of peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet. *Id.* at 551. The Supreme Court of the United States held the statute unconstitutional, as construed by the Louisiana Court, on the grounds that its broad scope intruded on the constitutionally protected rights of free speech and assembly. *Id.* at 552.

[1] Webster, New International Dictionary, (3d ed. 1961, Unabridged, p. 661).

dom of speech, press or expression frequently interrupts a state of peace or quiet or interferes with a planned, ordered or regular procedure, state or habit. New ideas more often than not create disturbances, yet the very purpose of the First Amendment is to stimulate the creation and dissemination of new concepts. The prohibition against making or countenancing a disturbance would literally make it a crime to deliver an unpopular speech which results in a "disturbance" or to stand by while someone else makes such a speech. This is clearly an invalid restriction of protected rights. 280 F. 2d 968, at 969-970.

* * * * *

"While a casual reading of the ordinance will reveal many other provisions with similar defects, the foregoing should be sufficient to demonstrate that the so-called "Disorderly Conduct" ordinance is both vague and indefinite as well as overbroad and therefore unconstitutional." 280 F. 2d 968, at 972.

Following the *Landry* decision, however, the language of the Illinois Supreme Court in the opinion in the present case was codified by the City of Chicago into a new disorderly conduct ordinance.(*) Thus, the holding of the Illinois Court has become judicial precedent for legislation, and both the opinion and the ordinance honor and further vagueness, overbreadth, and the heckler's veto.

Vagueness, Overbreadth, And Lack Of Standards.

Defendants may raise the vagueness and overbreadth of the ordinance because their conduct is not "hardcore

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(*) The language of the new ordinance is set out above, Point I, p. 20.

disorderly", cf. *Brown* v. *Louisiana,* 383 U.S. 131, 149 (1966), Brennan concurring; d. *United States* v. *Woodard,* 376 F. 2d 136 (7th Cir. 1967); *City* v. *Hunt,* 374 Ill. 234, 29 N.E. 2d 86 (1940).

The ordinance lacks standards: defendants had no notice that their conduct was prohibited:

> "There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be broad in scope as to stifle First Amendment freedoms, which "need breathing space to survive", *NAACP* v. *Button,* 371 U.S. 415, 433; for appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct; and for all such laws and regulations to be applied with an equal hand. We believe that all of these requirements can be met in an ordered society dedicated to liberty. We reaffirm our conviction that "[f]reedom and viable government are . . . indivisible concepts." *Cox* v. *Louisiana,* 379 U.S. 536, at 574-575 (1965)

cf. *Wright* v. *Georgia,* 373 U.S. 284, 293 (1963).

Discretion In The Police—Lack Of Standards.

The police had unlimited discretion to decide when defendants' conduct became disorderly, and did so when defendants' demonstration had become totally silent and the spectators were yelling and throwing rocks.

> "In the case before us Louisiana has by a broad, vague statute given policemen an unlimited power to order people off the streets, not to enforce a specific, nondiscriminatory state statute forbidding patrolling and picketing, but rather whenever a policeman makes a decision on his own personal judgment

that views being expressed on the street are provoking or might provoke a breach of the peace. Such a statute does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat. . . . This kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree. Cf *Cox* v. *Louisiana,* 379 U.S. 536, at 579," Black, J., concurring.

Protected Conduct Proscribed.

The ordinance sweeps within its broad provisions conduct which is protected by the first amendment.

NAACP v. *Button,* 371 U.S. 415 (1963), 433:

". . . [First] amendment freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions (citations omitted). Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity (citations omitted)."

Police action under the ordinance deterred other protesters in company with defendants from continuing their demonstration (Three persons ceased demonstrating and withdrew from the area when told by the police that their peaceful, silent demonstration was disorderly.), and ultimately was used to terminate defendants' protest, and to arrest and place them in custody.

The Chicago ordinance is classic vagueness and overbreadth. This court so held in *Terminiello, supra,* and relied on that decision to strike down other disorderly conduct ordinances. Yet, the Chicago ordinance continues,

and was used to stop defendants' protected First Amendment conduct and to convict them. This Court should declare the invalidity of the ordinance once and for all, vindicate petitioners' First Amendment rights, and reverse the decision below.

III.

THE DEFENDANTS WERE PREJUDICED BY AN INSTRUCTION ON A PARADE PERMIT ORDINANCE—WHERE THE CITY PROSECUTOR ARGUED THE POINT TO THE JURY—WHEN NO PERMIT WAS REQUIRED AND NO VIOLATION OF THE PARADE ORDINANCE CHARGED.

The opinion below is in direct conflict with the opinion of this Court in *Cox* v. *Louisiana,* 379 U.S. 536 (1964), at 556, fn.:

> "Although cited by neither party, research has disclosed the existence of a local ordinance of Baton Rouge, Baton Rouge City Code, Tit. 11, §210 (1957), which prohibits 'parade[s] . . . along any street except in accordance with a permit issued by the chief of police. . . .' A similar ordinance was in existence in *Fields* v. *South Carolina, supra.* As in *Fields,* this ordinance is irrelevant to the conviction in this case as not only was appellant not charged with its violation but the existence of the ordinance was never referred to by the State in any of the courts involved in this case, including this one, and neither the Louisiana trial court nor the Supreme Court relied on the ordinance in sustaining appellant's convictions under the three statutes here involved. Moreover, since the ordinance apparently sets forth no standards for the determination of the Chief of Police as to which parades to permit or which to prohibit, obvious constitutional problems would arise if appellant had been convicted for

parading in violation of it. See the discussion in text above; *Lovell* v. *Griffin, supra,* at 452-453; *Hague* v. *CIO, supra,* at 518; *Saia* v. *New York, supra,* at 559-560."

The Court below ignored the purpose, and also the effect of an instruction by a judge on a jury, and held (Opn., App. 16a):

> "It is also argued that the magistrate committed reversible error by instructing the jury that there was an ordinance requiring a permit for a parade or open air public meeting. A reading of the instructions as a whole convinces us that this instruction would not mislead the jury or prejudice the defendants. The instructions clearly state that defendants were charged with disorderly conduct and the forms of verdict dealt only with disorderly conduct."

Yet the instruction, given over objection (R. 751), read (R. 796-797):

> "The jury is instructed that on August 2nd, 1965, there was in full force and effect a Municipal Ordinance of the City of Chicago, Section 36-1 which states as follows: 'No parade shall be allowed on any public way, nor shall any open air public meeting be held in or upon any public way, until a permit in writing therefor shall be first obtained from the Department of Streets and Sanitation. . .' "

and in closing argument, the prosecutor (R. 759) noted that "The defense stipulated there was no parade permit and no application for a parade permit.", (R. 764) "There was no parade permit.", (R. 781) "We know by stipulation there was no permit to parade" and "we do know that they did not have a permit to parade.", (R. 784)

"There is another ordinance . . . if you are going to parade, you have to have a parade permit" and there is also another ordinance in the City of Chicago, written many years ago, again not August 1st, August 2nd, or sometime after the act occurred. That is, that if you are going to parade, you have to have a parade permit.

"What is the purpose of that? We are not saying that you cannot parade. We are saying that, tell us where you are parading, we can afford police protection. Tell us where you are parading. We can block off the street. You have seen The American Legion, V.F.W., the Shriners, you have seen them parade with permits, but you see the streets blocked off. The City doesn't have mental telepathy in order to say, 'Gee, I think there is going to be a parade in The Bridgeport Area. Maybe we ought to get some police protection out there, and block off the streets.'"

"The testimony is that no permit was taken."

It was clearly the purpose of the City to impress the jury that there was some wrongdoing in being without a permit, and the trial court was willing to let this prejudice occur.

Thus, the defendants were prejudiced by the instruction in their trial on free speech questions.

CONCLUSION.

Defendants were convicted under an ordinance that is unconstitutional, charged with annoyance by their mere presence, with violence they did not provoke, and burdened with a baseless instruction that made the jury believe

that they had violated some legal obligation. This Court should note the prejudice by the instruction, but should reverse outright and hold that the defendants, in the exercise of free speech, cannot be charged with the violence and disorder of their hecklers, and that the Chicago disorderly conduct ordinance is void for vagueness and unenforceable.

Respectfully submitted,

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